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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 308.

REPLY BRIEF FOR THE UNITED STATES.

In their brief in reply, counsel for plaintiff in error lay great stress upon the fact that I have conceded that Ballmann could not properly be committed for an offense not specified in the written charges of the grand jury, and that those charges, so far as they related to the book, were that Ballmann had failed "to produce the cashbook called for by the subpœna of April 7."

I am perfectly willing to stand or fall upon the proposition that Ballmann contemptuously failed to produce the cashbook called for by the subpœna. The subpœna, however, is open to two constructions: (1) That it calls for a cashbook "showing transactions under the name of A. Smith and A. Johnson, during the months of December, 1904, and January and February, 1905."

(2) That it simply calls for the cashbook in use in his business.

Assuming that the cashbook called for by the subpœna was one showing transactions under the name of A. Smith and A. Johnson, the existence of such a book is acknowledged by his various answers, evasive as they are. His defense, according to his written answer to the grand jury and the statement of his counsel at the trial, is not that there never was such a book, but that he did not have it at the time of the service of the subpœna or since. Now, as the evidence shows that there was but one cashbook in use in his business during the period in question, it is a necessary inference that that was the book to which he referred. And as the book referred to was used in the conduct of his business, his mere statement that it was not at the time of the service of the subpœna or since in his possession or under his control was clearly insufficient. The right of every man to control all books of account used in the conduct of his business can not be questioned. If exceptional circumstances exist, which would excuse or account for their nonproduction, they must be shown.

If the other view be taken, namely, that the subpœna simply called for the cashbook in use in his business, he has no ground whatever to stand upon. The uncontradicted evidence shows that there was such a book.

The subpœna is clearly susceptible of this latter construction. It calls for "cashbook, ledger, letterpress copy books, and all sheets showing transactions under the name of A. Smith and A. Johnson during

months of December, 1904, and January and February, 1905." The words "showing transactions under the name of A. Smith and A. Johnson," etc., may very properly be limited to the word "sheets," the object of the subpœna being to make him produce everything that would show such transactions, so that if perchance he did not keep those accounts in his regular books—the cashbook and ledger—but upon separate sheets, he would be obliged to produce them.

The view that the subpœna merely called for the cashbook in use in his business was ~~perhaps~~ doubtless that upon which the court below proceeded. That it was his own understanding of the subpœna may be inferred from the fact that in response thereto he produced the ledger in use in his business, which apparently did not show any accounts under the names of A. Smith or A. Johnson. If, however, it did show such transactions, then it is a fair inference that the cashbook used in his business also did, since the ledger is ordinarily posted from the cashbook.

It is so manifest that Ballmann's defense is only a technical quibble, that I fear I am unduly imposing upon the patience of the court in combatting it at length. The court will also observe that undue stress has been laid by counsel for plaintiff in error upon the cashbook phase of this case. The refusal to answer the questions is equally important.

HENRY M. HOYT,
Solicitor-General.

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